one week or 10 days as from the date of my examination which is on July 24, 1976. This bruise could be found after a sexual act." That would be July 17, or earlier than the reported dates of the incident. Two reports were tendered by the medical officer and we refer to the first. "The history as given by the father was that she had sexual intercourse *with a man* on the night of July 18, 1976 and July 19, 1976" and to the second "with a history of having had sexual intercourse on July 18, 1976 and July 19, 1976 *with several men.*" It is somewhat strange that the doctor did not mention of detection of any blood. According to the father, she was bleeding from the vagina on July 24 which was why he took her to the doctor. The girl herself said "on July 24 my father took me to the hospital because he saw blood. I had menses. It was profuse." Equally strange was the fact that if she was, prior to July 18, a virgin, no bleeding followed the intercourse. This appears from the evidence and on the two occasions after the acts of intercourse she put on her panties. No evidence was given of any soiling of the underpants.

It is significant she made no complaint after the incidents of July 18. On July 19, it was only when she was discovered missing from her uncle's house and both he and her father found her some distance from the house that she appeared to be distressed. We think that condition was because her disappearance had been reported by the uncle's son Mohd. Yacob (PW7). It must be a source for wonder that after the incident of July 18, she was prepared to leave her uncle's house with Mohd. Ali and PW7 said "Arisih met Ali at the steps.... They walked together and talked."

Other than her uncorroborated evidence, which called for extreme gullibility to accept, the prosecution evidence relied on cautioned statements taken from the appellants. The appellants, in our view, could not have used the language appearing therein. They were hardly of the type to refer to 8 p.m. as 2000 hours. We find one serious objection to reliance on these statements in support of the conviction in that "no trial within a trial" was held. The learned judge ruled them admissible after written submissions on admissibility were handed in by learned defence counsel and Deputy Public Prosecutor. We do not think we can invoke the proviso to section 60(1), as we consider there has been a failure of justice.

We accordingly set aside the conviction and sentence on all the appellants.

Appeal allowed.

Solicitors: *Rayner & Co.*

CHING YUEN TUNG v. BEP AKETIK

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) October 3 and December 29, 1977]

[Kota Kinabalu — Federal Court Civil Appeal No. 37 of 1977]

Contract — Agency — Allegation that person is authorised overseas agent — Whether personally liable.

Agency — Authorised overseas agent — Contract — Liability.

The respondents had been engaged to make a valuation of land for the appellant in respect of Po Hing Estate and had been paid by the appellant with a cheque issued by Po Hing Enterprise. The respondents were also asked by the appellant to do a valuation of a proposed industrial site at Sandakan. A copy of the report was at the request of the appellants sent to the Executive Vice-President of a company in New York. The respondents claimed payment but the appellant said that he was merely acting as the authorised overseas agent for the company in New York. At the trial the only evidence was given on behalf of the respondents and the appellant alleged that the respondents had not proved their case on the balance of probabilities. The appellant relied on the claim that he was the authorised overseas agent for the company in New York. The learned trial judge gave judgment for the respondents. The appellant appealed.

Held, dismissing the appeal: as in this case the learned judge was satisfied that the respondents had proved their case he was bound to enter judgment against the appellant. The learned judge was right to hold the appellant personally liable in the light of the evidence.

Cases referred to:-

(1) *Higgins* v. *Senior* (1841) 8 M & W. 834.

(2) *Calder* v. *Dobell* (1871) L.R. 6 C.P. 486.

(3) *Basma* v. *Weekes & Ors.* [1950] A.C. 441.

(4) *Rusholme Ltd.* v. *S.G. Read Ltd.* [1955] 1 All E.R. 180, 183.

FEDERAL COURT.

Ian Chin for the appellant.

C.I. Robertson for the respondents.

Lee Hun Hoe C.J. (Borneo): This appeal against the decision of the learned judge is concerned with the question of agency.

Respondents are architects with their head office in Kuala Lumpur and a branch office in Kota Kinabalu. Appellant purported to be the authorised overseas agent of Continental Development Company of New York (to be referred to as "CD.Co."). Samuel Li Kwan Yuk (PW1), an associate of the respondents' firm in Sabah, testified that he had done a valuation for appellant in respect of Po Hing Estate in 1968 but which was completed some time in 1969. On June 18, 1969 appellant spoke to him, among other matters, the preparation of an industrial lot in Sandakan and told him that the terms of engagement would be similar to that of Po Hing project. Consequently, by a letter bearing the same date appellant wrote to respondents as follows:—

"Sandakan 18th June, 1969.

Messrs. Booty Edward & Partners,
P. O. Box 840,
Kota Kinabalu.

Dear Sirs,

With reference to our telephonic conversation this morning, I write to confirm your appointment as the Appraiser to produce a report on the Proposed Light Industrial Site at L.20828 at Mile 2¼, North Road, Sandakan, giving valuations as follows:—

(1) Present value inclusive of all development works done to date;

(2) Value at completion of land development including road completion; and

(3) Value of completion including building of the proposed factories.

Your early attention will be much appreciated.

Yours faithfully,
For CONTINENTAL DEVELOPMENT CO. N.Y.,
SIGNED
(Ching Yuen Tung)
Authorised Overseas Agent.

c.c. Mr. D.G. Keefe, Sr.,
The Executive Vice-President,
Continental Development Co., N.Y.,
Messrs. Yuen Hap Development Co. Sandakan.

P.O. Box 320, Sandakan, Sabah, Malaysia, Telephone No. 7798
Telegraphic Address: 'CHINYUTUNG' Sandakan."

According to PW1 appellant gave him to understand that the developers in this case were Yuen Hap Development Company. The valuation report was prepared and copies duly supplied to appellant and to Mr. D.G. Keefe Sr. on the instructions of appellant, but the fees $4,985 (see Exhibit P5) and other disbursements $1,135.40 (see Exhibit P6) totalling $6,120.40 had not been paid by appellant despite repeated demands.

At the time respondents undertook the light industrial project Po Hing project was nearing completion. Respondents received full payment from appellant for the Po Hing project in July, 1969. The cheque was issued by Po Hing Enterprise Co. Sdn. Bhd.

By a letter dated May 13, 1970 respondents wrote to appellant in the following terms:—

"We refer to our bill of fees Nos. JE47/1(975) dated 30-8-69 for $4,985.00 and JE47/2(979) dated 18-9-69 for $1,135.40 for the work carried out according to your instructions have already remained outstanding for more than seven months.

Your co-operation to settle these outstanding bills by sending us your cheque by return mail will be appreciated.

In the event that you have any queries on our bills please write to us immediately."

Appellant replied on June 8, 1970 as follows:—

"Re: Bill No. JE47/1(975) for $4,985.00
Bill No. JE47/2(979) for $1,135.40

I refer to your previous correspondence in respect of the above-mentioned bills.

I regret to say that I was merely the authorised overseas agent for Continental Development Co. of New York. As such I am not personally liable for payment of your aforesaid bills. However, I will bring this matter to the attention of my Principal, or rather, his estate, as he has recently deceased.

Yours faithfully,
SIGNED
(Ching Yuen Tung)."

PW1 was shocked to receive the letter and to learn that appellant was passing the bill to someone. Appellant informed him it would take time to settle the bill as he had some problem with his principal since one of the Directors had passed away. Eventually, respondents sued appellant.

At the trial only PW1 gave evidence and produced various documents. Counsel for appellant submitted that respondents had not proved their case on balance of probabilities and rested his case on that submission. Appellant made clear that he was an authorised overseas agent for "CD.Co.". Also, a copy of the valuation report was sent by respondents to "CD.Co." which stated quite clearly (Exhibit P1) at page 1 under Authorisation as follows:—

"This Valuation Report is prepared on the instruction of Mr. Ching Yuen Tung acting as authorised Overseas Agent for Continental Development Company of New York, U.S.A."

Appellant's case is that respondents should look to his principal for payment. On the other hand, counsel for respondents said the work was carried out at the special request of appellant. Respondents' case rested on the arrangements between the parties. Payment was made by appellant in respect of the Po Hing project. The present valuation report was based on the same terms as Po Hing project and respondents expected payment from appellant also. "CD.Co." were outside the jurisdiction and respondents would not have given credit to foreign firms. The learned judge gave judgment for respondents with costs. Appellant appealed.

In *Higgins* v. *Senior*[1] there was an agreement in writing for the sale of goods which purported on the face of it to be made by the defendant and was subscribed by him. The defendant sought to avoid liability by proving that he had made the agreement as agent for a third person and this was known at the time to the plaintiff. It was held that this did not enable the defendant to escape liability.

There was no suggestion that payment would not be made by appellant but by his principal. If an agent contracts in such a form as to render himself personally responsible he cannot afterwards, whether his principal is disclosed or not at the time of the contract, relieve himself of responsibility. The test here is whether appellant had contracted in such a way as to make himself personally liable having regard to the surrounding circumstances.

In *Calder* v. *Dobell*[2] a broker called Cherry, contracted in his own name to buy goods from the plaintiffs, having previously disclosed to them that he was acting as agent for the defendant. It was held unanimously by the Court of Common Pleas and in the Exchequer Chamber that the plaintiffs were entitled to sue the defendant on this contract. Defendant argued that the court should consider the distinction between the case where one party was not aware when making the contract that the other was acting as an agent and the case where he was aware of that fact but nevertheless contracted with the agent personally. In the former, the principal would be sued but not in the latter case. The argument was rejected. Kelly, C.B. said at page 499 that:—

"The contract was made in the name of Cherry, the agent but the case shows that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal, at their election."

Higgins v. *Senior*[1] and *Calder* v. *Dobell*[2] were applied in *Basma* v. *Weekes & Ors.*[3] In that case appellant claimed for specific performance of an agreement by which the first three respondents had agreed to sell to him two houses, of which they were tenants in common. Respondents pleaded, *inter alia*, that the

agreement alleged was not a sufficient memorandum to comply with the requirements of the Statute of Frauds in that the purchaser named therein was acting, to the knowledge of the respondents, as agent for the appellant who was the principal and that the agreement did not identify the appellant as purchaser. Held that an agent who contracted in his own name did not cease to be contractually bound because it was proved that the other party knew when the contract was made that he was acting as agent. It was also held that the agreement which was made in his name did not cease in that event to contain the names of the contracting parties, and therefore did not cease to satisfy the Statute of Frauds; and, accordingly that, as the agent could have sued on the contract, so could his principal, the appellant.

The contract was with appellant but the foreign principal was made known later. That was not the first occasion respondents had business dealings with appellant. In the Po Hing project respondents performed similar services for appellant and were paid by appellant. It is immaterial that the cheque was issued by a third person. The point is that appellant made the payment himself. So that it is only reasonable that respondents should look to appellant for payment in the present case. After all, respondents knew nothing of and had nothing to do with the foreign principal except to send copies of the report on the instructions of appellant. The learned judge was entitled to accept the evidence of PW1 to show that appellant had made representation to him that the terms of the second payment would be the same as the first project, that is to say, respondents would look to appellant for settlement of bills in the second project in the same way as the first project. Everything respondents did was based on the instructions of appellant. Whether appellant can be personally liable on the contract is a question of construction having regard to the surrounding circumstances. As Pearce J. said in *Rusholme Ltd.* v. *S.G. Read Ltd.*[4] at page 183:—

"The fact that a person is agent and is so known to be does not itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. When he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability, unless a contrary intention appears. The same presumption arises when he signs in his own name without qualification."

Appellant says he is the "authorised overseas agent." Whether the relationship of agency exists in the present case depends not on the use of terminology but on the exact circumstances of the relationship between the alleged principal and agent. The word "agent" may be used in at least two other senses. First, the word is frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature which he discharges as the other's alter ego and not merely as an intermediary between the principal and the third party, e.g. a solicitor who may be his client's agent for the purpose of instituting or continuing legal proceedings on his behalf. Secondly, the word has often been used in business in a complementary and not a legal sense, as in the case of the appointment of a "sole selling agent", "exclusive agent", or "authorised agent". The relation so established between the appointor and appointee is usually that of vendor and purchaser and no contractual relationship is established between the appointor of the agent and third parties by the sale of goods by the so-called agent to those third parties. See *Halsbury's* Laws of England, 4th Edition, Volume 1 page 419, paragraph 702.

In this case appellant elected to call no evidence. If on the evidence the learned judge is satisfied that respondents have proved their case he is bound to enter judgment against appellant. He has heard the parties on points of law and dealt with the authorities cited. As to his finding of facts there should be no interference. With respect, the learned judge was right to hold appellant personally liable in the light of the evidence. Accordingly, I would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Ong Hock Sim F.J. and **Charles Ho J.** concurred.

Appeal dismissed.

Solicitors: *Yap & Chin; Robertson Pang & Co.*

MOHAMED JOHAN MUTALIB v. PUBLIC PROSECUTOR

[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) October 3 and December 29, 1977]

[Kota Kinabalu — Federal Court Criminal Appeal No. 53 of 1977]

Criminal Law and Procedure — Sentence — Fine — Compensation — Whether compensation be ordered for Government — Taking other offences into consideration — Charge of using as genuine a forged document — Penal Code, ss. 465 and 471 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 171, 283 and 426.

In this case the accused had pleaded guilty to three charges of offences of using as genuine a forged document. He was sentenced to a term of two years' imprisonment on each charge, the sentences to run consecutively. In addition he was ordered after completion of his imprisonment "to pay government a fine of $3,000 on each charge by monthly instalments of $100 in default four months' imprisonment in respect of each instalment." The court took into consideration two other offences but no record was made that the consent of the prosecutor and the accused was obtained.

Held: (1) the sentence of fine was illegal as it contravened section 283 of the Criminal Procedure Code in that the total term of imprisonment in default might amount to 30 years;

(2) section 426 of the Criminal Procedure Code which enables the court to make an order for the payment of compensation to "any person or to the representatives of any person injured" does not contemplate an order in favour of the Government;

(3) before outstanding offences could be taken into account the consent of the prosecutor and the accused must be obtained and this fact included in the record but this was not done in this case;

(4) the fine and sentence in default should be set aside and the sentences of two years' imprisonment should be ordered to run concurrently.

FEDERAL COURT.

Appellant in person.

Abdul Wahab Patail (Deputy Public Prosecutor) for the respondent.